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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. CHERYL WESLEY, Defendant and Appellant.	D042356 (Super. Ct. No. SCD171284)

APPEAL from a judgment of the Superior Court of San Diego County, Janet I. Kintner, Judge. Affirmed.

A jury convicted Cheryl Wesley of selling/furnishing cocaine base. The court suspended imposition of sentence and placed her on three years' probation including a condition that she serve 365 days in custody. Wesley contends the trial court erred in failing to sua sponte instruct the jury on the limited purpose of evidence of other criminal acts, and that she was denied effective assistance of counsel through failure to request a limiting instruction.

FACTS

Around 6:00 p.m. on December 9, 2002, a San Diego police officer was working undercover as part of a narcotics team. He approached a male in the 300 block of 13th Avenue. The officer asked the male if he could help him find $20 worth of rock cocaine. The male and the officer walked from 13th Avenue to K Street to 14th Avenue. There, the officer asked a man later identified as Samuel Jackson, a codefendant, if he could "hook me up with a twenty?" Jackson told the officer to wait and then walked southbound on 14th Avenue to a group of seven or eight people. Jackson stood next to Wesley, who was part of the group. The officer approached and stopped seven to 10 feet from the group. He saw Wesley appear to exchange objects with two people in the group. The two group members then walked away looking down into their hands. The officer approached Wesley. She said, "I'm not dealing with you. I don't know who you are. You could be the police." Jackson motioned for the officer to back away, whispering for him to wait. The officer moved 10 or 15 feet from where he saw Wesley and Jackson engage in a hand-to-hand exchange. Jackson then walked to the officer and exchanged a piece of rock cocaine for $20. The officer gave a prearranged "bust" signal. Police arrested Jackson and Wesley. The officer identified them at the scene as the people from whom he obtained the rock cocaine. He did not see Wesley throw away narcotics or the marked money used to buy the drugs. Wesley had neither when arrested. After Wesley was arrested, the officer advised her of her *Miranda* rights. (*Miranda v. Arizona* (1966) 384 U.S. 436.) She told him she had been smoking rock cocaine for four

or five years. A friend she contacted that evening asked her to sell rock cocaine. She sold one for $9 and one for $15 before her contact with the officer.

The defense called an officer who provided the jury with a tape recording of the undercover officer's identification of the suspects and a volunteer with a drug outreach program who testified she had seen no indication Wesley was under the influence of narcotics.

While the court and counsel discussed instructions, defense counsel told the court he was not requesting CALJIC No. 2.50, a limiting instruction on evidence that the defendant committed a crime other than the crime on which she is being tried.

DISCUSSION

During deliberations, the jury asked the court:

> "Is Ms. Wesley only being charged with the sale involving [the officer]?
>
> "Can we consider the first two hand to hand transactions observed by [the officer] as violations of Health [and] Safety Code [section] 11352?"

After conferring with counsel the court responded:

> "Defendant Ms. Wesley is only being charged with the sale involving [the officer]. That is Count 1.
>
> "If you still need an answer to the second question in your note, please ask another question."

It is well settled that evidence of other crimes or misconduct is inadmissible when it is offered to show that a defendant had the criminal disposition or propensity to commit the crime charged. (Evid. Code, § 1101, subd (a).) However, evidence of other crimes or

misconduct by a defendant is admissible if it "'tend[s] [to] logically, naturally, and by reasonable inference . . . establish any fact material for the people, or to overcome any material matter sought to be proved by the defense[.]' [Citations.]" (*People v. Peete* (1946) 28 Cal.2d 306, 315.) Evidence Code section 1101, subdivision (b), codifies this exception to the general rule of inadmissibility by providing for the admission of such evidence "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . . .") other than the defendant's propensity or disposition to commit such crimes or bad acts.

Here, the undercover officer testified he saw Wesley appear to engage in hand-to-hand transactions with two individuals before she spoke to him. The court overruled defense counsel's objections to testimony regarding what the participants appeared to be doing. In closing argument, the People argued evidence of Wesley selling drugs to two other individuals before selling to the undercover officer was circumstantial evidence. Wesley does not argue that the evidence was inadmissible or that the reference to the two earlier transactions was prosecutorial misconduct. She argues solely that the trial court should have sua sponte included CALJIC No. 2.50 in the instructions. CALJIC No. 2.50 provides: "Evidence has been introduced for the purpose of showing that the defendant committed [a crime] [crimes] other than that for which [he] [she] is on trial. [¶] [Except as you will otherwise be instructed,] [This] [this] evidence, if believed, [may not be considered by you to prove that defendant is a person of bad character or that [he] [she] has a disposition to commit crimes. It] may be considered by you [only] for the limited purpose of determining if it tends to show: [¶] [A characteristic method, plan or scheme

in the commission of criminal acts similar to the method, plan or scheme used in the commission of the offense in this case which would further tend to show [the existence of the intent which is a necessary element of the crime charged] [or] [the identity of the person who committed the crime, if any, of which the defendant is accused] [or] [a clear connection between the other offense and the one of which the defendant is accused so that it may be inferred that if defendant committed the other offense[s] defendant also committed the crime[s] charged in this case];] [¶] [The existence of the intent which is a necessary element of the crime charged;] [¶] [The identity of the person who committed the crime, if any, of which the defendant is accused;] [¶] [A motive for the commission of the crime charged;] [¶] [The defendant had knowledge of the nature of things found in [his] [her] possession;] [¶] [The defendant had knowledge or possessed the means that might have been useful or necessary for the commission of the crime charged;] [¶] . . . [¶] [The crime charged is a part of a larger continuing plan, scheme or conspiracy;] [¶] [The existence of a conspiracy]. [¶] For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. [¶] [You are not permitted to consider such evidence for any other purpose.]"

In *People v. Collie* (1981) 30 Cal.3d 43, 64, the Supreme Court said:

> "Evidence of past offenses may not improperly affect the jury's deliberations if the facts are equivocal, the charged offense is dissimilar, or the evidence is obviously used to effect one or more of the many legitimate purposes for which it can be introduced. [Citations.] Neither precedent nor policy favors a rule that would saddle the trial court with the duty either to interrupt the testimony sua sponte to admonish the jury whenever a witness implicates the defendant in another offense, or to review the entire record at trial's end in search of such testimony. There may be an occasional

> extraordinary case in which unprotested evidence of past offenses is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose. In such a setting, the evidence might be so obviously important to the case that sua sponte instruction would be needed to protect the defendant from his counsel's inadvertence. But we hold that in this case, and in general, the trial court is under no duty to instruct sua sponte on the limited admissibility of evidence of past criminal conduct."

Here, the undercover officer testified that he asked Jackson if he could "hook me up with a twenty." After Jackson spoke with Wesley and it appeared Jackson and Wesley engaged in a hand-to-hand exchange, Jackson handed the undercover officer a piece of rock cocaine in exchange for $20. The evidence that Wesley also engaged in apparent hand-to-hand exchanges of unknown substances with two strangers was not "a dominant part" (*People v. Collie, supra,* 30 Cal.3d at p. 64) of the People's case against Wesley. Nor was it highly prejudicial and minimally relevant, especially in light of the court telling the jury in response to its question during deliberations that Wesley was only charged with the sale involving the undercover officer.

INEFFECTIVE ASSISTANCE of COUNSEL

Alternatively, Wesley contends her trial counsel was ineffective in failing to request CALJIC No. 2.50. However, defense counsel specifically informed the court that he did not want it to give the limiting instruction and, on this record, we cannot conclude that there could be "no conceivable reason" for counsel's desire to have the instruction omitted. Accordingly, Wesley has not established that she suffered ineffective assistance from her attorney. (*People v. Jones* (2003) 29 Cal.4th 1229, 1254.)

DISPOSITION

The judgment is affirmed.

McINTYRE, J.

WE CONCUR:

McCONNELL, P. J.

HALLER, J.